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JAMES D. MAHONEY,
Clerk.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1917.

AMERICAN LAND COMPANY
(a corporation),
Complainant and Appellant,
vs.
LOUIS ZEISS,
Defendant and Appellee.

No. 280

BRIEF FOR APPELLANT

IN REPLY TO ARGUMENT FOR APPELLEE ON MOTION TO ADVANCE THE CAUSE FOR HEARING OR TO DISMISS THE APPEAL.

Oscar R. Pass,
Edward J. McCormick,
Samuel Knight,
Counsel for Complainant and Appellant.

Filed this _____ day of February, 1918.

JAMES D. MAHONEY, *Clerk.*

By _____ *Deputy Clerk.*

No. 473

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1909.

AMERICAN LAND COMPANY
(a corporation),
Complainant and Appellant,
vs.
LOUIS ZEISS,
Defendant and Appellee.

BRIEF FOR APPELLANT

ON MOTION TO ADVANCE THE CAUSE FOR HEARING OR TO DISMISS THE CERTIFICATE.

The certificate requests instruction upon the question

> "whether the Act of the Legislature of the State of California providing for the establishment and quieting of title to real property in case of the loss or destruction of public records, approved June 16, 1906 (Statutes of California, 1906, page 78), is violative of the Fourteenth Amendment to the Constitution of the United States."

It is unnecessary here to repeat the facts stated in the certificate. In asking the Court to advance the cause for hearing, we can add nothing to the statement of the Circuit Court of Appeals, in the certificate, that

> "the interests of very many persons in real estate in the City of San Francisco are affected by the Act of the Legislature above referred to, and it is of the utmost importance that the question of the validity of that Act should be speedily and authoritatively determined."

Appellant, also, is desirous that this Court answer the questions propounded by the certificate, and that they be answered as speedily as is consistent with the convenience of the Court. We fear, however, that the certificate may be dismissed for want of jurisdiction, and we feel that, if it must be dismissed, it should be dismissed at once. Not only would there be long delay of justice to the parties if the certificate should be permitted to remain on the docket and then dismissed a year and a half or so from now, but it would be deeply disappointing to the very many persons affected who keenly feel that, as expressed by the Court of Appeals, the validity of the Act "should be speedily and authoritatively determined". Our duty to the Court requires, it seems to us, that we should indicate the reasons that have induced fear of a dismissal of the certificate, and, if our view is correct, it will save much time if those reasons are presented now rather than discovered later.

THE COURT IS WITHOUT JURISDICTION OF THE CERTIFICATE.

1. *The case is not one in which the judgment of the Circuit Court of Appeals is made final.*

An examination of the bill of complaint (a certified copy of the record is presented with the motion) shows that the jurisdiction of the Circuit Court was founded not only on diversity of citizenship, but also on the necessary involution of the Fourteenth Amendment. We specially set out that the decree of the Superior Court, the cloud of which we ask to have removed, "was made "and obtained without due process of law and in viola- "tion of the Fourteenth Amendment to the Constitu- "tion of the United States" (Record, p. 17). The facts showing lack of notice and opportunity to be heard in the proceedings leading up to the decree of the California Court are averred with particularity in the bill; and it is also shown in the bill that the proceeding complained of was in exact conformity with the Act of the California Legislature, claimed by us to be unconstitutional but which Act the Supreme Court of California has declared to be valid.

Title and Document Restoration Co. v. Kerrigan, 150 Cal. 389;

Hoffman v. Superior Court, 151 Cal. 386.

Under the State law the judgment that clouds our title is valid; it is only upon the Federal Constitution that we can rely.

We could not prevail under the Fourteenth Amendment without proving, as we allege (Record, p. 17), our

entire ignorance of the proceeding until after we had lost all opportunity to be heard therein. This requires evidence dehors the record.

Tyler v. Judges, 179 U. S. 405.

The jurisdiction in such a case as this is nothing other than the anciently established jurisdiction to remove the cloud of an instrument not void on its face.

Even if it should be thought that the judgment is void on its face, the California statute (Section 738, C. C. P.) gives the right to remove the cloud.

Kittle v. Bellegarde, 86 Cal. 556.

This gives jurisdiction in equity in the Federal Courts.

Reynolds v. Bank, 112 U. S. 733.

In any view, it would be highly artificial to say, in the face of common reason and business necessity, that there is no equity jurisdiction to remove the dense cloud of a judgment which under the decisions of the State Courts is valid.

This is particularly true where, as here, the statute (Section 11) requires the judgment to be recorded, and expressly provides that it shall be "conclusive".

Bradley v. Fallbrook, 68 Fed. 948.

The jurisdiction of the High Court of Chancery was maintained in the face of a demurrer, although the lease complained of was on its face void upon a mere reference to an Act of Parliament set out in the bill. This in the year 1845, reviewing the course of decision.

Molesworth v. Howard, 2 Coll. 145.

Lord Eldon, Chancellor Kent and the Great Chief Justice would never have had doubt of the equity jurisdiction, even in the absence of the California statute (Section 738, C. C. P.).

Peirsoll v. Elliott, 6 Pet. 95.

The reason for any opposing view falls absolutely in face of the fact that complainant has no right to possession until March 26, 1950, and that in the meantime respondent is entitled to possession (Record, p. 7). In such case there is no reasonable opportunity to try the question at law, and in the meantime, unless the equitable jurisdiction may be invoked, complainant's title is unmerchantable.

This, then, is a suit to remove a cloud upon our title, and the invalidity of the judgment can be shown only by invoking the federal constitution. The jurisdiction of the Circuit Court was, therefore, grounded not only upon diversity of citizenship, but also upon the necessary involution of the constitutional question.

The case is, consequently, not final in the Circuit Court of Appeals.

Mississippi R. Commission v. Illinois C. R. Co., 203 U. S. 335;

Henningsen v. United States Fidelity & G. Co., 208 U. S. 404.

The same result flows from considering the bill in the aspect that a judgment has passed against us without any hearing or opportunity to be heard, without fault on our part, and it is impossible to get relief in the proceeding in which the judgment was entered.

We did not know of the pendency of the McEnerney proceeding until more than a year after judgment entered (Trans. p. 17). The act requires us to appear within three months from the first publication of the summons "or within such further time, *not exceeding* "*thirty days* as the Court may for good cause grant" (Sec. 8). Our complete right on the merits is admitted by the demurrer. We were not served with notice of the proceeding.

> "The ground for the exercise of this jurisdiction is that there has been no fair adversary action at law."
>
> *Pom. Eq. Rem.* (1905), Vol. II, p. 1092, Sec. 648.

> "One of the commonest illustrations is found in cases where no jurisdiction has been obtained because there has been no service of summons or process."
>
> *Ibid.*, p. 1112, Sec. 663.

> "A judgment has been entered where the service was insufficient, and the defendant has had no opportunity to defend his estate. It is not necessary to decide on the conflicting evidence. It is a case where either by fraud or accident or by mistake, without fault on his part, the defendant has been deprived of the opportunity to make his defense, and within the rule laid down by Ch. J. Marshall, the judgment must be set aside, and an opportunity afforded to test the question in a court of law."
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> *Kibbe v. Benson*, 17 Wall. 624.

See, also,

Earle v. McVeigh, 91 U. S. 503;

Indiana, etc., Co. v. Brinkley (C. C. A. 8th Circuit), 164 Fed. 963.

The equitable jurisdiction is very clear where, as here, the defendant was at all times our tenant. Upon facts, in this respect, precisely similar to those here, the Supreme Court of California has very recently held:

> "We see no logical escape from the doctrine that the relation of landlord and tenant exists; that the possession of the latter is that of the former."
>
> *Potrero Nuevo Land Co. v. All Persons,* 38 Cal. Dec. 531 (Dec. 7, 1909).

Not even a fine with proclamations—the harshest bar known to the common law—was ever a bar under such circumstances as here presented. The Chancellor held it unconscientious that the possession of a tenant, trustee, or mortgagor in possession, should be used to devest the estate of the landlord or the cestui que trust or mortgagor.

> *Lord Portsmouth v. Vincent,* 1 Sch. & Lef. 380;
> *Brereton v. Gamul,* 2 Atk. 240;
> *Pomfret v. Windsor,* 2 Ves. Sen. 472.

Here, too, it is against conscience that our tenant should be permitted to injure us by holding and claiming title under a recorded decree procured without notice to us. Yet this is what the Act, if constitutional, has permitted him to do (Sec. 11).

In this aspect, also, in view of the statutes and decisions of the State of California, it is impossible to draft a bill without invocation of the federal constitution. In that way only can complainant show its right.

In fact, the constitutional right is the only right it has. The State statutes and decisions give it none.

If, therefore, the jurisdiction of the Circuit Court was, as seems clear, based not only upon diversity of citizenship but also upon constitutional grounds, it follows that the certificate herein must be dismissed.

It was not the purpose of the Circuit Court of Appeals Act to enlarge the jurisdiction of the Supreme Court; and the language of the Act can hardly be so construed as to permit the certification of questions arising in cases in which there is a statutory right of appeal. There is no necessity for certification in such cases, and if the certificate should be retained the same questions would have to be again answered on the appeal, imposing double labor upon the Court and counsel, and double expense and delay upon the parties. The clause in Section 6 of the Act, that provides for certification of questions, is an exception to the provision giving finality to certain judgments of the Circuit Courts of Appeals, and is correlated with the clause "excepting also" that final judgments of the Circuit Courts of Appeals may be reviewed by certiorari.

Columbus Watch Co. v. Robbins, 148 U. S. 266, 268;

Texas & P. Ry. Co. v. Gentry, 57 Fed. 422;

Rose's Code of Fed. Proc., Sec. 40.

2. *The certificate does not show that instruction is desired for the proper decision of the questions certified.*

It is not enough to request instructions, but it must be shown by the certificate that the instruction is desired for the "proper decision" of the question.

Columbus Watch Co. v. Robbins, 148 U. S. 266;
German Ins. Co. v. Hearne, 118 Fed. 134.

The certificate in the present case does not intimate that the Circuit Court of Appeals is unable to reach a "proper decision", but, on the contrary, the reason stated for requesting instruction is that the questions may "be speedily and authoritatively determined".

3. *The certificate, in effect, presents the whole case for decision.*

The only questions suggested to the Circuit Court upon the demurrer, and the only questions passed upon by the Circuit Court in its opinion, were the very questions presented by the certificate.

The demurrer admits the title of complainant and the only ground upon which the demurrer was, or, it seems, can be sustained is that the decree of the State Court is valid. That decree cannot be valid unless the Act of the Legislature be also valid. To hold that the Act of the Legislature is "violative of the Fourteenth Amend-
" ment to the Constitution of the United States", or to hold that "by virtue of the decree rendered by the said
" Superior Court of the City and County of San Fran-
" cisco, the appellant has been deprived of its property
" without due process of law" is necessarily to reverse the decree of the Circuit Court. To hold otherwise is necessarily to affirm that decree.

We are willing and anxious that the Court answer the questions propounded; but, in view of the premises, we respectfully submit that the question of jurisdiction of the certificate be now passed upon.

Dated, San Francisco,
February 15, 1910.

CHARLES PAGE,
EDWARD J. McCUTCHEN,
SAMUEL KNIGHT,
Counsel for Complainant and Appellant.